STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

TERRI ROHDE, BRENDON QUILTER, MARY QUILTER, WALTER MACKEY, BARBARA MACKEY, GARY GIBSON, ELLEN GIBSON, TED JUNGKUNTZ, LOISE JUNGKUNTZ, DAVID SPONSELLER, MARY SPONSELLER, MIKE GLADIEUX, MARTHA GLADIEUX, HELEN RYSSE, TERRY TROMBLEY, JOHN WILLIAMS and THERESE WILLIAMS,

Plaintiffs-Appellants,

v.

ANN ARBOR PUBLIC SCHOOLS a/k/a The Public Schools of the City of Ann Arbor, BOARD OF EDUCATION FOR ANN ARBOR PUBLIC SCHOOLS, KAREN CROSS, in her official capacity as President of the Board of Education for Ann Arbor Public Schools, and GLENN NELSON, in his official capacity as Treasurer of the Board of Education for Ann Arbor Public Schools,

Defendants-Appellees,

and

ANN ARBOR EDUCATION ASSOCIATION, MEA/NEA,

Intervening Defendants-Appellees.

Supreme Court Case No. 128768

Court of Appeals Case No. 253565

Washtenaw County Circuit Court Case No. 03-1046-CZ

128768

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DEFENDANTS-APPELLEES' OPPOSITION TO PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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DO PLAINTIFFS-APPELLANTS MEET THE GROUNDS FOR LEAVE TO APPEAL SET FORTH IN 7.302(B)(1), (2), OR (3)?

Plaintiffs-Appellants would answer.....Yes

Defendants-Appellees answer.....No

This Court should answer.....No

DID THE COURT OF APPEALS ERR WHEN IT FOUND THAT PLAINTIFFS-APPELLANTS DO NOT HAVE STANDING TO CHALLENGE THE ANN ARBOR PUBLIC SCHOOLS' DOMESTIC PARTNER BENEFITS POLICY AND AFFIRMED THE CIRCUIT COURT'S GRANT OF SUMMARY DISPOSITION TO DEFENDANTS?

Plaintiffs-Appellants would answer.....Yes

Defendants-Appellees answer .....No

The Circuit Court would answer.....No

The Court of Appeals would answer.....No

This Court should answer.....No

SHOULD THIS COURT DECIDE THE ISSUE OF WHETHER THE SCHOOL DISTRICT VIOLATED THE DEFENSE OF MARRIAGE ACT AND/OR THE NEW CONSTITUTIONAL AMENDMENT WHEN IT ENTERED INTO A COLLECTIVE BARGAINING AGREEMENT PROVIDING BENEFITS TO THE SAME SEX DOMESTIC PARTNERS OF ITS EMPLOYEES WHERE 1) THIS ARGUMENT WAS NOT ADDRESSED BY THE CIRCUIT COURT OR THE COURT OF APPEALS; 2) THE ISSUE OF THE APPLICABILITY OF THE CONSTITUTIONAL AMENDMENT TO THE PROVISION OF DOMESTIC PARTNER BENEFITS HAS NEVER BEEN BRIEFED; AND 3) THAT VERY ISSUE IS CURRENTLY BEING LITIGATED IN CASES PENDING IN BOTH INGHAM COUNTY CIRCUIT COURT AND FEDERAL COURT?

Plaintiffs-Appellants would answer.....Yes

Defendants-Appellees answer .....No

This Court should answer.....No

IF THE COURT SHOULD DECIDE TO GRANT LEAVE TO APPEAL AND ADDRESS AN ISSUE NOT REACHED BY EITHER COURT BELOW, DID THE DISTRICT VIOLATE THE DEFENSE OF MARRIAGE ACT WHEN IT ENTERED INTO A COLLECTIVE BARGAINING AGREEMENT PROVIDING BENEFITS TO THE SAME SEX DOMESTIC PARTNERS OF ITS EMPLOYEES?

Plaintiffs-Appellants would answer.....Yes

Defendants-Appellees answer .....No

The Circuit Court did not reach this question

The Court of Appeals did not reach this question

This Court, if it reaches this question, should answer .....No

IF THE COURT SHOULD DECIDE TO GRANT LEAVE TO APPEAL AND ADDRESS AN ISSUE NOT REACHED BY EITHER COURT BELOW, NOT INCLUDED IN THE COMPLAINT, AND NEVER BRIEFED BELOW, WAS THE TWENTY-FIFTH AMENDMENT INTENDED TO PROHIBIT SAME SEX DOMESTIC PARTNER BENEFITS AND IS SUCH AN INTERPRETATION OF THE AMENDMENT CONSTITUTIONAL?

Plaintiffs-Appellants would answer.....Yes

Defendants-Appellees answer .....No

The Circuit Court did not reach this question

The Court of Appeals did not reach this question

This Court, if it reaches this question, should answer .....No

INTRODUCTION

In September 2003, Plaintiffs-Appellants filed suit in Washtenaw County Circuit Court, claiming that the Ann Arbor Public Schools ("AAPS") violated the Defense of Marriage Act by entering into a collective bargaining agreement providing health benefits to same-sex domestic partners of district employees. On Defendants' Motion for Summary Disposition, the Circuit Court declined to reach the substantive issue of the validity of the domestic partner benefits policy, but dismissed Plaintiffs' First Amended Complaint on the grounds that they did not have standing to sue under MCL 129.61, the statute under which Plaintiffs sought to proceed, and which allows taxpayers to sue a political subdivision of the state for tax revenues "illegally expended."

Plaintiffs then appealed to the Court of Appeals, and immediately sought review by this Court under the by-pass appeal provision of the Michigan Court Rules. This Court denied Plaintiffs' Application for Leave to Appeal, and the case continued in the Court of Appeals. While the case was pending in the Court of Appeals, Michigan voters passed Proposal 2, which became the 25th amendment to the Michigan Constitution. Plaintiff filed a Notice of Supplemental Authority with the Court of Appeals, claiming that the AAPS' provision of domestic partner benefits was unlawful under the new Constitutional amendment. The Court of Appeals decided this case on standing grounds only, just as the Circuit Court did, and it too found that the Plaintiffs lacked standing in that they failed to comply with the requirements of MCL 129.61. As a result, the Court of Appeals did not reach the issue of whether the AAPS benefits policy violated the Michigan Defense of Marriage Act *or* the Constitutional amendment.

Plaintiffs now seek leave to appeal the Court of Appeals' decision to this Court. But make no mistake, Plaintiffs are not really seeking a ruling from this Court on the issue of their standing and the requirements for bringing suit under MCL 129.61. Rather, as they themselves

state (Plaintiffs-Appellants' Application for Leave to Appeal at 1), they are "fundamentally" asking that this Court "review" 1) an issue that neither the Circuit Court nor the Court of Appeals has treated in the first instance, that is, the substantive issue of whether the AAPS same-sex domestic partner benefits policy violates the Michigan Defense of Marriage Act; *and* 2) an issue that was neither raised in the Complaint nor ever briefed in this matter, specifically, the legality of such benefits in light of the new Constitutional amendment.

As did the Circuit Court and the Court of Appeals, this Court too should decline Plaintiffs' invitation to engage in judicial activism. This case is about standing, and whether or not Plaintiffs complied with the pre-litigation demand requirements of MCL 129.61-- an issue which does not warrant review by this Court. The specific issue of the legality of same sex partner benefits under the new amendment is currently pending in Ingham County Circuit Court as well as the United States District Court for the Western District of Michigan. It is in those cases, and any appeals that follow therefrom, that this issue should be decided. It should not be decided in this case, in which Plaintiffs lack standing and the issue has not been briefed or addressed in any way by the trial court or intermediate level appellate court.

For these reasons and those set forth below, Defendants respectfully request that the Court deny Plaintiffs-Appellants' Application for Leave to Appeal.

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Complaint

Plaintiffs are seventeen individuals who claim to pay state and local taxes used to fund the AAPS. Defendants are the AAPS and the Board of Education of the AAPS ("the Board")(collectively "the District"); Karen Cross, President of the Board; and Glenn Nelson, Treasurer of the Board. Intervening Defendant is the Ann Arbor Education Association ("AAEA"), the exclusive bargaining representative of the teachers of AAPS.

Plaintiffs brought suit in Washtenaw County Circuit Court in September 2003 pursuant to MCL 129.61, alleging that Defendants violated state law by entering into collective bargaining agreements that define, and provide benefits for, same-sex domestic partners of District employees. (First Amended Compl., attached as Exhibit A, at ¶¶ 21-22.)[1] The crux of Plaintiffs'

[1] The collective bargaining agreement provision at issue states:

> 6.211.5 The Board shall offer the medical health benefits included in plans defined in Appendix XII to same sex domestic partners of teachers. This coverage shall be subject to Internal Revenue Service Regulations and the specifications and requirements of the District's medical health insurance providers. To be eligible the teacher must complete the verification form which is mutually agreed to by the Board and Association.

(Ex. A to First Amended Compl., Ex. A hereto.)

To be eligible for domestic partner benefits, AAPS employees and their partners must declare the following:

- They are of the same sex.
- One of them is an employee of the AAPS eligible for employee health benefits and the other is not.
- They have an intimate, committed relationship, and have had this relationship for at least the past six months.
- They share the same principal residence(s) and the common necessities of life, and have done so for the past six months.
- They agree to be responsible for each other's basic living expenses during their domestic partnership. They also agree that anyone who is owed these expenses can collect from either of them.

claim is that by granting benefits to domestic partners, defendants improperly "defined and recognized a new form of domestic relations," and treated this relationship as "the equivalent of marriage," in violation of Michigan's Defense of Marriage Act. (*Id.* at ¶¶ 16, 21, 22.) The Defense of Marriage Act defines marriage as a relationship between a man and a woman, and states that same-sex marriages are invalid in Michigan. MCL 551.1.

Plaintiffs sought: (1) a declaration that Defendants' domestic partner benefits policy is "unlawful," (First Amended Compl. at Wherefore ¶ 1); (2) an accounting of public funds expended on domestic partner benefits (*id.* at Wherefore ¶ 2); and (3) an injunction prohibiting Defendants from entering into any contract resulting in domestic partner benefits and from expending public funds to pay for those benefits. (*Id.* at Wherefore ¶ 3.) Plaintiffs now seek virtually the same relief from this Court. (Plaintiffs-Appellants' Application for Leave to Appeal at iv.)

The Circuit Court Grants Summary Disposition to Defendants

Defendants immediately brought a Motion for Summary Disposition pursuant to MCR 2.116(C)(5) and (C)(8), arguing first that Plaintiffs lacked standing to bring their claim, and second, that because the District's policy did not violate the Defense of Marriage Act, Plaintiffs had failed to state a claim. The Circuit Court heard oral argument, and granted Defendants' Motion by Opinion and Order of December 29, 2003. (*See* Opinion and Order of December 29, 2003, attached as Exhibit B.)

- They are both 18 years of age or older and otherwise competent to enter into a contract.
- Neither of them is married.
- They are not more closely related by blood than is allowed for a legal marriage.
- Neither of them has a different domestic partner currently.

(Ex. B to First Amended Compl.)

The Circuit Court did not reach the substantive issue of the validity of the domestic partner policy, but dismissed the suit on the grounds that Plaintiffs did not have standing to sue under MCL 129.61. The court held that Plaintiffs had not sued "on behalf of or for the benefit of the treasurer of [the District]," as contemplated by the express language of MCL 129.61. (*Id.* at 3.) The Circuit Court also noted that Plaintiffs' assertion in their Complaint that they had "request[ed]" Defendants to "halt this illegal use of tax revenues in 2001" did not demonstrate to the satisfaction of the court that Plaintiffs had complied with the mandatory requirement of MCL 129.61 that Plaintiffs make a "demand" prior to filing suit. (*Id.* at 3-4.)

Plaintiffs' Application For Review By This Court Is Denied

Plaintiffs moved for reconsideration on January 9, 2004, and the Circuit Court denied that motion on January 12, 2004. Plaintiffs filed a Notice of Appeal to the Michigan Court of Appeals on January 30, 2004, and filed an Application for Leave to Appeal to this Court on March 12, 2004, seeking review by this Court prior to a decision by the Court of Appeals. This Court denied Plaintiffs' bypass application on April 30, 2004. The parties then filed their briefs with the Court of Appeals in the summer of 2004.

Proposal 2 Is Passed, And The Court Of Appeals Refuses To Allow Briefing On The Issue

While the case was pending in the Court of Appeals, Michigan voters passed Proposal 2, to amend the Michigan Constitution as follows:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

Const 1963, art 1, § 25. On December 21, 2004, Plaintiffs filed a Notice of Supplemental Authority with the Court of Appeals arguing that the constitutional amendment was supplemental authority for their case and entitled Plaintiffs to the relief sought, because the

AAPS same-sex partner benefit policy violates the new amendment. On January 12, Defendants filed motions to strike the notice of supplemental authority or, in the alternative, for leave to submit supplemental briefs. Specifically, Defendants argued that because the Constitutional amendment was a new issue, it could not be raised in a Notice of Supplemental Authority (pursuant to MCR 7.212(F)(1)) and should therefore not be considered, and in the alternative, if the Court of Appeals were to consider the applicability of the newly passed constitutional amendment to this case, the parties should be permitted to file briefs on the issue.

On February 2, 2005, the Court of Appeals denied Defendants' motions, and allowed them to file only one-page responses to the notice of supplemental authority. On February 23, 2005, the District filed a Motion for Reconsideration, again arguing the necessity of briefing on the important issue of whether or not the amendment prohibited same sex benefits if the Court of Appeals were to consider the issue. (A copy of the Motion for Reconsideration is attached as Exhibit C.) That motion was denied on April 4, 2005, the day before oral argument in the Court of Appeals.

The Attorney General Opinion and Subsequent Litigation

In the meantime, on March 16, 2005, the Michigan Attorney General issued Opinion No. 7171, which interpreted the constitutional amendment as prohibiting the provision of same-sex domestic partner benefits by a city to its employees. Plaintiffs filed yet another Notice of Supplemental Authority with the Court of Appeals on March 24, 2005, citing this Attorney General Opinion.

On March 21, 2005, a group of employees of the State of Michigan or its subdivisions and their same sex domestic partners filed suit in Ingham County Circuit Court against Governor Granholm (in her official capacity) seeking a declaratory judgment that the Constitutional

amendment does not prevent government employers from providing benefits to their employees' same sex partners and their children. The plaintiffs in that action allege that: the plain language of the amendment does not bar the provision of such benefits; the provision of such benefits does not constitute the recognition of same sex marriage; the proponents of the amendment repeatedly stated that the amendment was about marriage only and was not intended to take away benefits; the intention of the voters in approving the amendment was not to deprive the domestic partners and children of state employees of benefits; and a construction of the amendment to prohibit such benefits would violate numerous provisions of the Michigan Constitution, including the equal protection clause. That case is currently pending as *National Pride at Work, Inc, et. al. v Granholm*, Ingham County Circuit Court Case No. 05:368-CZ, and plaintiffs have filed a motion for summary disposition, set for hearing in July.

Similarly, on June 8, 2005, a same-sex couple filed suit in the United States District Court for the Western District of Michigan against Attorney General Mike Cox and Governor Granholm, again, in their official capacities, alleging, *inter alia*, that the amendment's purported prohibition of same sex domestic partner benefits violates the equal protection clause of the United States Constitution. That case is currently pending as *Flatau, et. al. v. Cox, et. al.*, United States District Court for the Western District of Michigan Case No 4:05CV0059.

The Court of Appeals Decision

On April 14, 2005, following oral argument, the Court of Appeals issued its *per curiam* opinion in this case (attached as Exhibit D). The Court of Appeals first disagreed with the Circuit Court's conclusion that the suit was not filed "on behalf of or for the benefit of" the AAPS treasurer, as is required by MCL 129.61. However, the court did agree with the Circuit Court's conclusion that Plaintiffs failed to satisfy the demand requirements of MCL 129.61. The

Court of Appeals closely reviewed the letters sent by Plaintiffs, which Plaintiffs claimed fulfilled the requirements, and concluded that the letters, rather than demanding legal action as required by the statute, merely requested that the expenditures stop; and no letter was sent to the AAPS treasurer, the officer responsible for maintaining such a suit. (Court of Appeals decision at 4). As a result, the Court of Appeals concluded that Plaintiffs lacked standing to maintain this suit, affirmed the Circuit Court's grant of summary disposition to Defendants, and declined to reach any other issues. (*Id*, pp. 4-5.)

ARGUMENT

Standard of Review

Plaintiffs have sought leave to appeal to this Court pursuant to MCR 7.302(B)(1)-(3), which provide that an application for leave to appeal must show that:

> (1) the issue involves a substantial question as to the validity of a legislative act;
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity; [or]
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence.

MCR 7.302 (B)(1)-(3). Of course, whether or not to grant an Application for Leave to Appeal is within this Court's discretion.

Should this Court grant the Application, it will review the Circuit Court's decision *de novo*. This Court reviews decisions whether to grant summary disposition *de novo* (*see, e.g., Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999)); it reviews issues of statutory construction *de novo* (*see, e.g., Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991)); and whether a party has standing is a question of

law that this Court reviews *de novo* (*see, e.g., Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co,* 471 Mich 608, 612; 684 NW2d 800 (2004)).

Summary of Argument

Plaintiffs' Application for Leave to Appeal fails to show that the issue decided by the Court of Appeals meets the requirements of MCR 7.302(B)(1), (2), or (3), the only grounds on which leave to appeal is sought. Plaintiffs make a half-hearted attempt to shoehorn the standing issue into the enumerated grounds, but when touting the "significant public interest" of this matter, and insisting that the matter involves "legal principles of major significance" (Plaintiffs-Appellants' Application at vi), they repeatedly point to the substantive issue of the validity of the domestic partner benefits policy and not to the threshold procedural issue of whether they have standing to bring this claim. Indeed, Plaintiffs conclude their argument on why this case merits review by this Court with the statement: "this Court should grant review in order to remove any doubt that marriage must remain, as the people of the State of Michigan have said, a unique and privileged institution based upon the unique relationship between one man and one woman." (*Id.* at vii.)

Put simply, the question of whether the letters in this case meet the demand requirements of MCL 129.61— *the only issue addressed by the Court of Appeals in the order now sought to be appealed to this Court* — is clearly not a substantial question as to the validity of a legislative act, or an issue that has significant public interest, nor is it an issue that involves a legal principle of major significance to the state's jurisprudence. Plaintiffs' Application should be denied.

I. PLAINTIFFS-APPELLANTS DO NOT MEET THE GROUNDS FOR LEAVE TO APPEAL SET FORTH IN MCR 7.302(B)(1), (2), OR (3).

A. The Particular Issue Addressed By The Court of Appeals Is Not A Substantial Question As To The Validity Of A Legislative Act, Does Not Have Significant Public Interest, And Does Not Involve A Legal Principle of Major Significance To The State's Jurisprudence.

Plaintiffs seek leave to appeal to this Court based solely on MCR 7.302(B)(1), (2), or (3). Plaintiffs claim that their case "involves substantial questions of Michigan law," "has significant public interest" and "involves legal principles of major significance to the state's jurisprudence." (Application for Leave to Appeal at vi.) As for 7.302(B)(1), Plaintiffs do not attempt to show that an issue involving "a substantial question *as to the validity of a legislative act*" is involved. Rather, Plaintiffs erroneously refer to "substantial questions of Michigan law" generally, and pay lip service to the standing issue, saying that one of the "substantial questions of Michigan law" involved is "the circumstances under which taxpayers may avail themselves of the statutory authority to bring suit," but "the more fundamental question concerns the force and effect of Michigan's constitution and laws governing marriage." (*Id.*) As for 7.302(B)(2), the second claimed basis for review, Plaintiffs claim that the issues have "significant public interest" because "the ...purpose of MCL 169.71 [sic] is to authorize suits to prevent unlawful expenditures of public funds" (a principle not disputed in this case), and because "the purpose of the amendment is to 'secure and preserve the benefits of marriage for our society and for future generations of children' by prohibiting the recognition of same-sex marriages." (*Id.*) Finally, as regards MCR 7.302(B)(3), the last claimed basis for review by this Court, Plaintiffs give up the charade altogether, and do not even mention the question of standing, arguing only that the "legal principles of major significance to the state's jurisprudence" involved are that "if AAPS has authority to define, recognize, and subsidize same-sex 'domestic partnerships', then there is

nothing to stop any mayor, city or village from recognizing same-sex marriages under the guise of 'domestic partnerships.'" (*Id.*, p. vii.)

Plaintiffs clearly blur the distinction between their *allegations* and the only *issue* appropriate for review, the standing issue.[2] In this case, the only *issue* treated by the Court of Appeals, and thus the only issue appropriate for review by this Court, is the issue of whether Plaintiffs have standing to sue under MCL 129.61 and, more specifically, if the letters sent by Plaintiffs fulfilled the demand requirements of MCL 129.61. This particular issue clearly does not involve a substantial question as to the validity of a statute. Nor does the standing issue have significant public interest — a search of Michigan opinions indicates that MCL 129.61 has rarely been treated by the courts over the seventy years since its enactment.[3] Finally, it cannot be stated that the issue of taxpayer standing under this relatively obscure statute involves a legal principle of "major significance" to the state's jurisprudence. In sum, Plaintiffs fail to show that the standing issue meets any of the grounds for application for leave to appeal set forth in MCR 7.302(B)(1)-(3).

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[2] Importantly, MCR 7.302 (B) speaks not of "claims" but of "issues," stating that an applicant for leave to appeal to the Michigan Supreme Court must show that:

> (1) *the issue* involves a substantial question as to the validity of a legislative act;
>
> (2) *the issue* has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity; [or]
>
> (3) *the issue* involves legal principles of major significance to the state's jurisprudence.

MCR 7.302(B) (emphasis added).

[3] *See Burton Twp of Genesee County v Speck,* 378 Mich 213; 144 NW2d 347 (1966); *Culver ex rel Longyear, Treasurer of School Dist v Brown*, 259 Mich 294; 243 NW2d 10 (1932), and this case.

B. The Court Should Not Grant Leave To Review Issues Never Reached By The Trial Court Or The Court Of Appeals, And On Which No Record Has Been Developed And No Briefing Was Permitted.

While Plaintiffs claim that the substantive issue of whether the district's domestic partner benefits policy is unlawful meets these jurisdictional grounds for review by this Court, neither the Circuit Court nor the Court of Appeals treated this substantive issue, rendering it unsuitable for "review" by this Court. *See, People v Reed*, 449 Mich 375, 408; 535 NW2d 496 (1995) ("This Court should not bypass the trial court and the Court of Appeals by resolving issues not addressed by those courts.").

It is undisputed that this Court has functions beyond its review of issues decided in the lower courts. For example, this Court has the authority to treat certified questions pursuant to MCR 7.305, where "the question is of such public moment as to require early determination according to executive message of the Governor addressed by the Supreme Court." MCR 7.305(A)(1). *See, e.g., In re Executive Message from the Governor,* 650 NW2d 326 (Mich, 2002). This Court also has the authority to issue advisory opinions pursuant to the Michigan Constitution, art 3, § 8, as to "the constitutionality of legislation after it has been enacted into law but before its effective date," upon the request of either house of the legislature or the governor. And, of course, the Court has original jurisdiction in certain limited circumstances. *See* MCR 7.304. However, where, as in this case, there is neither a request for an advisory opinion from the Legislature or the governor, nor a certified question, this Court has been extremely hesitant to rule on issues not decided below. *See Jones v Keetch,* 388 Mich 164; 200 NW2d 227 (1972) (disagreement among justices whether Court could review issue *treated by trial court*, but which the parties did not also pursue in the Court of Appeals).

Moreover, in this case, one of the issues Plaintiffs ask this Court to review is an issue 1) that was not raised in the Complaint or any amendments thereto; 2) on which no factual record

has been developed; and 3) which was never briefed in either of the lower courts, let alone addressed by those courts. Indeed, Defendants are not aware of *any precedent whatsoever* for this Court's reviewing such a matter, and presumably, neither are Plaintiffs, as they have cited no such authority. Specifically, Plaintiffs ask this Court to review whether the benefits policy at issue violates state law, including the Defense of Marriage Act and the new Constitutional amendment. Although the issue of the whether the policy violates the Defense of Marriage Act was briefed in both the Circuit Court and the Court of Appeals, it was never addressed by either court and therefore, as set forth above, should not be reviewed by this Court. But the issue of the new amendment goes even one step farther, in that it is entirely new. It was not included in the Complaint, it arose only while this case was pending in the Court of Appeals, the Court of Appeals did not address the issue, and the Court of Appeals refused to allow briefing on the applicability of the amendment to this case.

Meanwhile, as discussed above, the very issue Plaintiffs seek to have this Court review on a naked record, without the benefit of briefing below or any review by prior courts — specifically, whether the Constitutional amendment prohibits same sex partner benefits — is an issue of great public importance that is currently pending in both the Michigan state and federal courts. The issue will likely make its way to this Court following the disposition of the Ingham County declaratory judgment action. However, if and when it does, it will be, as it should, in a case that involved this specific issue from the outset, in which there is no question about the parties' standing, and in which a complete record was made and the lower courts actually examined and ruled upon this specific issue. Plaintiffs, found to lack standing by two courts, may have strong personal feelings about the issue of same-sex marriage, and may be eager to

have this Court review the issue sooner rather than later, but that does not justify this Court's deciding this important issue before its time, in a case in which it has never before been treated.

II. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT PLAINTIFFS LACKED STANDING TO BRING THEIR CLAIM.

Should this Court, notwithstanding the arguments presented above, grant leave to appeal and review the question of standing, the Court will find that the Court of Appeals did not err when it concluded that Plaintiffs lacked the legal capacity to bring their claim. Defendants brought their Motion for Summary Disposition on the grounds that Plaintiffs lacked standing to sue under MCL 129.61, which states:

> Any person or persons . . . resident in any . . . school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto. Security for costs shall be filed by the plaintiff or plaintiffs in any such suit or action and all costs and expenses of the same shall be paid by the person or persons instituting the same unless and until a recovery of such funds or moneys be obtained as the result of such proceedings.

The Circuit Court found that Plaintiffs lacked standing under MCL 129.61 for two reasons, first, because they did not file their suit "on behalf of or for the benefit of" the AAPS treasurer, and second, because they had not satisfied the statute's demand requirement. [4] The Court of Appeals disagreed with the first prong of the Circuit Court's ruling, but agreed with the Circuit Court's finding that Plaintiffs had not complied with the demand requirement and

[4] In addition, Plaintiffs failed to file the necessary security for costs, although this was not one of the Circuit Court's bases for granting summary disposition to Defendants.

therefore lacked standing. The Court of Appeals' holding in this regard was correct and should not be reversed by this Court.

The Court of Appeals carefully reviewed the letters sent by Plaintiffs to various individuals which Plaintiffs claim satisfy the demand requirements. The letters read as follows:

> I [or "we"] write to request that you investigate and halt the use of public funds to provide so-called "domestic partnership" benefits to employees of the Ann Arbor public schools. I [or "we"] believe that the School District's extension of these benefits to its employees exceeds its authority and violates the state law governing marriage. I [or "We"] ask that you halt this illegal use of public funds at your earliest possible convenience.

(*See* exemplar letters attached as Exhibit E, complete set of letters are attached to Plaintiffs' Motion for Reconsideration filed in the Circuit Court.) The Circuit Court noted that "a 'request' to Defendants to 'halt this illegal use of tax revenues in 2001' does not meet the specific statutory requirement" of MCL 129.61. (December 29, 2003 Opinion, attached as Exhibit B at 3-4.) The Court of Appeals agreed, and a review of the statute and the letters themselves shows the correctness of the lower courts' rulings.

Nowhere in the letters do Plaintiffs "demand" anything.[5] Rather, they merely ask that an investigation be undertaken and the use of the funds halted – "at your earliest convenience." The Court of Appeals properly looked to the dictionary definition of "demand", which is defined as "to ask for with proper authority; claim as a right". (Court of Appeals decision, Ex. D at 4, citing *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002); *Random House Webster's College Dictionary* (1997)). Plaintiffs' letters clearly do not claim anything "as a

[5] Similarly, the Complaint does not allege that a demand was made. Instead, it states that Plaintiff Rohde "requested" that the Board of Education stop this use of tax revenues and that no action was taken as a result of this "request." (Amended Cplt, Ex. A, ¶ 19.) Nor did the Complaint attach the letters as exhibits showing purported compliance with the statutory demand requirements.

right." To the contrary, the letters ask for an "investigation," which in and of itself implies that something may *or may not be* illegal.

More significantly, the Court of Appeals also deemed the letters to be insufficient to fulfill the demand requirement because the statute states that demand "shall be made on the public officer, board or commission whose duty it may be to maintain such suit", indicating that the whole purpose of the demand requirement is to inform the proper persons that legal action is forthcoming and demand that such action be taken by the recipient. Plaintiffs cite only one case in their Application for Leave to Appeal in connection with the standing issue, *Shenkman v Bragman*, 261 Mich App 412, 413-414; 682 NW2d 516 (2004), cited for the proposition that when interpreting a statute, the court must "consider the object of the statute and apply a reasonable construction that best accomplishes the purpose of the statute." Defendants completely agree, and that is precisely what the Court of Appeals did. It is clear from the wording of the statute that the object of the demand requirement is to give the appropriate persons notice and the first opportunity to bring suit. If and only if a letter, demanding that legal action be taken, has been sent to the person or entity whose duty it would be to bring such suit, and the recipient fails to bring suit, can the sender take matters into his or her own hands and file a lawsuit under MCL 129.61.

Plaintiffs' letters, on the other hand, contain no reference whatsoever to MCL 129.61. Accordingly, they do not put the recipient on notice that legal action is forthcoming. Nor do the letters demand that legal action be brought -- the very basis of the requirement. Furthermore, as the Court of Appeals noted, no letter was sent to the AAPS Treasurer himself, who is likely the "public officer...whose duty it may be to maintain such suit," and in that regard as well, the

statutory requirements were not fulfilled.[6] Because the Court of Appeals correctly ruled that Plaintiffs did not meet the demand requirements of MCL 129.61 and therefore lacked standing to bring suit, the Court of Appeals' opinion affirming the grant of summary disposition to Defendants should be affirmed.[7]

[6] In addition, although not noted by the lower courts, the letters at issue were sent in December 2000 and January 2001, yet suit was not brought until November 2003, almost three years later. This significant time delay means that letters may have been sent to the wrong people, as there is, of course, turnover in Board composition over three years, and substantially undercuts the argument that the letters fulfilled the requirement of putting Defendants on notice that legal action was "forthcoming." It also undercuts the argument that these are "demand" letters, as a "demand" implies urgency and necessity, not something that can wait years for resolution.

[7] Even if this Court were to find that the Court of Appeals' holding that Plaintiffs did not fulfill the demand requirement was in error, the result of the Court of Appeals' ruling was correct because Plaintiffs do not meet the constitutional requirements for standing. As this Court made clear in *National Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608, regardless of statutory standing, a plaintiff must satisfy the judicial test for standing. Specifically, this Court held:

> At a minimum, standing consists of three elements: "First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical' . Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly...traceable to the challenged action of the defendant, and not...the result [of] the independent action of some third party not before the court.' Third, it must be 'likely', as opposed to merely 'speculative', that the injury will be 'redressed by a favorable decision.'"

471 Mich at 628-29, *quoting Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001), (which itself was quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-61 (1992)). This Court also noted that the "particularized injury" requirement generally means that a plaintiff "must have suffered an injury distinct from that of the public generally." 471 Mich at 615. Because Plaintiffs in this matter clearly do not meet the above requirements, and specifically, have not suffered an invasion of a legally protected interest, they do not satisfy the judicial test for standing, regardless of whether or not they have properly complied with MCL 129.61.

III. MICHIGAN'S DEFENSE OF MARRIAGE ACT DOES NOT PROHIBIT THE SCHOOL DISTRICT FROM ENTERING INTO A COLLECTIVE BARGAINING AGREEMENT THAT INCLUDES DOMESTIC PARTNER BENEFITS.

Plaintiffs spend the lion's share of their Application for Leave to Appeal arguing that the District's domestic partner benefits policy is unlawful in that it violates the Defense of Marriage Act and the constitutional amendment, issues which, as set forth above, are not properly before this Court. But taking them one at a time, should this Court determine that it is appropriate for it to review whether or not the benefits violate the Defense of Marriage Act, an issue not reached by either the Circuit Court or the Court of Appeals, this Court will conclude that Plaintiffs' claim is baseless.

A. The School Code Grants The District The Power To Contract With Its Employees For Wages And Benefits, And Nowhere Forbids The Provision At Issue In This Case.

In the Revised School Code, the Michigan Legislature chose to delegate broad authority to "general powers school districts," such as the AAPS, to manage and operate the schools within the district:

> A general powers school district has all of the rights, powers, and duties expressly stated in [the Revised School Code]; may exercise a power *implied or incident to* any power expressly stated in this act; and, except as provided by law, may exercise a power *incidental or appropriate to the performance of any function related to* operation of the school district in the interests of public elementary and secondary education in the school district.

MCL 380.11a(3) (emphasis added). The Code specifically contemplates that a district's powers include hiring and contracting with qualified teachers, MCL 380.1231, "[h]iring, contracting for, scheduling, supervising, or terminating employees," MCL 380.11a(3)(d), and entering into "agreements . . . with other entities, public or private . . . as part of performing the functions of the school district," MCL 380.11a(4). In fact, the statutory provision providing that the district "shall hire and contract with qualified teachers" has been interpreted by this Court as not merely

a right of the district, but a mandatory *obligation*. MCL 380.1231; *Detroit Fed'n of Teachers Bd of Educ*, 396 Mich 220, 227; 240 NW2d 225 (1976) (interpreting former § 340.569, containing identical language).

Thus, by law, the District:

- Must hire and contract with qualified teachers;
- Has the power to hire and contract with other employees who are not teachers;
- Has the power to enter into agreements with other entities, including unions;
- May exercise a power implied or incident to hiring and contracting for employees;
- May exercise a power implied or incident to entering into agreements with other entities, including unions; and
- "Except as provided by law," may exercise a power incidental or appropriate to the performance of any function related to operation of the school district in the interests of public elementary and secondary education in the school district.

Plaintiffs cannot successfully argue that the phrase "except as provided by law" bars the District from entering into a collective bargaining agreement that provides domestic partner benefits. It is important to remember that the *only law* to which Plaintiffs' Complaint points as the basis for their suit is the Defense of Marriage Act which, as explained below, has nothing to do with the District's power to contract, nothing to do with employee benefits, and does not forbid anything other than same-sex marriages — which the District is not performing.

Furthermore, it is apparent that the Legislature has contemplated that there are certain types of contracts into which a school district may not enter, and certain expenditures that a school district may not make. *See, e.g.*, MCL 380.1230b(6) (prohibiting a school board from entering into a contract that has the effect of suppressing information about an employee's unprofessional conduct); MCL 380.1217 (prohibiting school board from applying money to the "support and maintenance of a school sectarian in character"). There is no such prohibition on

domestic partner benefits. Thus, despite its power to do so, the Legislature has not chosen to prohibit school districts from expending funds on domestic partner benefits.

In sum, employee benefits are a matter of contract between the District and the unions with which it bargains. Indeed, this Court has found that the terms of contracts entered into between school boards and teachers shall be determined by agreement of the parties, and that it is error for the circuit court to "direct[] the kind of contract particular teachers would receive." *Detroit Fed'n of Teachers*, 396 Mich at 227. Because the School Code vests the District with broad powers to enter into agreements with unions in order to hire qualified teachers and other employees, and because nothing in the Code prohibits a district from contracting with its employees for domestic partner benefits, Defendants are fully within their rights to expend public funds on domestic partner benefits.

B. The Public Employees Relations Act Contemplates Bargaining For Benefits, And Nowhere Prohibits Domestic Partner Benefits.

Like the Revised School Code, the Public Employees Relations Act ("PERA") grants broad authority to a school district "to manage and direct the operations and activities of the public schools under its control." MCL 423.215(2). PERA provides that there are certain matters over which unions and public school districts may not bargain, but which are instead within the exclusive control of the school district. These matters include the length of the school day or school year, MCL 423.215(3)(b), open enrollment opportunities, MCL 423.215(3)(d), contracting with third parties for non-instructional support services, MCL 423.215(3)(f), and the identity of the policyholder of group insurance benefits, MCL 423.215(3)(a).

Nowhere does PERA prohibit contracting for benefits for same-sex domestic partners. In fact, while prohibiting school districts and the unions with whom they bargain from negotiating about the identity of the policyholder of group benefits, PERA explicitly states: "This

subdivision does not affect the duty to bargain with respect to types and levels of benefits and coverages for employee group insurance." (*Id.*) Thus, the Legislature contemplates that "types and levels of benefits and coverages" are appropriate subjects for bargaining between school districts and unions.

Like the School Code, PERA indicates that the Legislature has left the issue of public school employee benefits, including the types and levels of benefits, up to school boards and the unions with which they bargain. Plaintiffs can point to nothing in the School Code or in PERA that even hints at a prohibition on benefits for same-sex domestic partners. This absence likely explains Plaintiffs' reliance on the Defense of Marriage Act. Unfortunately for Plaintiffs, that Act does not prohibit domestic partner benefits either.

C. Michigan's Defense Of Marriage Act In No Way Prohibits The District From Entering Into A Collective Bargaining Agreement That Includes Domestic Partner Benefits.

Michigan's Defense of Marriage Act ("DOMA") has nothing to do with the District's ability to enter into a collective bargaining agreement providing for domestic partner benefits for its employees. DOMA, entered into law on June 26, 1996, states:

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

MCL 555.1.

At the same time this language was adopted, the Legislature amended 1939 PA 168, MCL 551.271, which provides for recognition of marriages contracted in other states, to set forth explicitly: "This section does not apply to a marriage contracted between individuals of the same sex, which marriage is invalid in this state." MCL 551.271. Similarly, MCL 551.272 was enacted, which provides: "This state recognizes marriage as inherently a unique relationship

between a man and a woman, as prescribed by [MCL 555.1], and therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction." MCL 551.272.

As each of these passages indicates, Michigan's Defense of Marriage Act, consisting of these three statutes, grew out of concern that the "full faith and credit" clause of the United States Constitution, Article IV, Section 1, would require Michigan to recognize same-sex marriages contracted in other states, should other states make such marriages available. R. Young, House Bill 5662 and Senate Bill 937, Analysis at 2. (Exhibit C to Defendant's Court of Appeals Brief.) There is no evidence that the Act grew out of a desire on the part of the Legislature to prohibit public or private institutions from providing domestic partner benefits.

At bottom, summary judgment in favor of Defendants was correct, even if Plaintiffs are found to have standing, because none of these statutes addressing marriage, even when read in the broadest possible terms, address the District's practice of extending benefits to domestic partners of District employees. These statutes do not forbid the expenditure of funds, public or otherwise. They do not mention employee benefits granted to same-sex partners or to anyone else. They do only this: prohibit a marriage between same-sex partners, and constrain the state from recognizing a marriage of this type which has been permitted by the law of another state. The District's policy is completely unrelated to either matter.

Plaintiffs do not allege that the District is "marrying" same-sex couples, or that it is recognizing marriages of such couples performed in other states. Such an argument would be ridiculous. Instead, Plaintiffs argue that the illegality of the District's same-sex benefits policy lies in the District's creation and definition of a new type of relationship that is "the *functional equivalent* of lawful marriage." (Amended Compl, Ex. A, at ¶ 16 (emphasis added).) However,

even a cursory look at the District's definition of a domestic partnership eviscerates this claim. First, domestic partners seeking benefits must be of the same sex, (Ex. B to Amended Compl.); under Michigan law, married couples cannot be of the same sex. Domestic partners must have been in their partnership as an "intimate, committed relationship" for a minimum of six months, *id.*; there is no analogous time requirement for married couples seeking District benefits. Domestic partners must share the same residence, *id.*; spouses seeking benefits are not required to do so. Domestic partners must agree to be financially interdependent, and to be liable for one another's debts, *id.*; married couples seeking benefits are free to choose whatever financial arrangement they wish. Finally, domestic partners must *not* be married. *Id.* Thus, for Plaintiffs to argue that the District's definition renders a domestic partnership the "functional equivalent" of marriage is odd indeed.

Plaintiffs also repeatedly argue that the District's domestic partner benefits policy is unlawful because it is "defining, recognizing, and subsidizing" domestic partnerships. (Application for Leave to Appeal at pp. vii, 11, 15, 17, 18, 19, 20.) This suggests that the District elevates a domestic partnership to the status of marriage. However, the District's policy confers on domestic partners absolutely no legal rights or responsibilities *other than the right to receive benefits from the District as a bargained-for benefit.* In fact, the District policy documents relied upon by Plaintiffs (Exhibits to Amended Compl.), explicitly indicate that domestic partners do not enjoy at least two of the legal benefits afforded to spouses under state and/or federal law. The District points out to its employees that domestic partners have "no rights to COBRA continuation." (Ex. A to Amended Compl.) And the District points out that its contribution towards coverage for a domestic partner or his or her dependent children is included in the employee's gross income for state and federal income tax purposes. (*Id.*) (Contributions

for coverage of spouses or children, by contrast, are exempt from taxation. 26 USC 152; Treas Reg 1.106-1). Nor does the provision of such benefits grant the same-sex partners of District employees any of the other benefits enjoyed by spouses of employees as a result of marriage, such as pension or other retirement benefits.[8]

Plaintiffs' arguments that the District treats domestic partners as the functional equivalent of spouses, and that the District provides some special legal recognition to domestic partners, ring hollow, as does their argument that DOMA on its own terms forbids the provision of benefits to same-sex partners of District employees. To put it simply, Plaintiffs object to the District's extension of benefits to domestic partners on moral and political grounds. But their objections — however sincere and deeply felt they may be — cannot magically rewrite DOMA or put words in the mouth of a Legislature that has been silent on the issue of benefits extended to same-sex partners. In the end, Plaintiffs' reliance on DOMA is unavailing.

D. Plaintiffs' Reliance On Preemption Analysis Is Misplaced, As The District's Domestic Partnership Benefits Policy Is A Matter Of Contract, Not A Law Or Ordinance.

Plaintiffs base part of their proposed argument on appeal on preemption analysis, arguing that the state "occupies the field" of domestic relations; the District's policy improperly "enters into" that field; and that the District's domestic partner benefits policy "directly conflicts" with, or "undermines" state law, and is therefore impermissible (Plaintiffs' Application for Leave to Appeal at pp. 15, 17-23). The problem with these arguments is that the District is not legislating, and preemption analysis is therefore inapposite.

[8] Similarly, the mere fact that the collective bargaining agreement provides for same-sex domestic partner benefits does not grant the domestic partner any of the other benefits of marriage granted by Michigan law, such as: the right to property acquired during the marriage (MCL 557.204); the right to sue for the wrongful death of the spouse (MCL 600.2922); the right to retirement benefits (MCL 552.18); the right to seek support for minor children or for oneself (MCL 800.404, MCL 552.451), and the like.

Plaintiffs take their arguments in part from *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977), which states:

> A *municipality* is precluded from enacting an *ordinance* if 1) the *ordinance* is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme preempts the *ordinance* by occupying the field of *regulation* which the *municipality* seeks to enter, to the exclusion of the *ordinance*, even where there is no direct conflict between the two *schemes of regulation*.

401 Mich at 321 (emphasis added).

However, *Llewellyn* applies to "ordinances" and "regulations" enacted by local political bodies—*not to labor contracts entered into by a school district and its employees.* In *Llewellyn,* this Court struck down an anti-obscenity ordinance enacted by the City of Detroit on the grounds that it was preempted by the existing state statutory scheme regarding obscenity. In coming to this conclusion, the Court relied upon the Michigan Constitution, 1963, art 7, § 22, and the Home Rule Act, MCL 117.4j(3), both of which govern the powers of a city and proscribe the enactment of local laws that contravene state law. Notably, neither this constitutional provision nor this statute governs the powers of a school district.

Plaintiffs also make much of *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002). But this case too is based on a preemption analysis. In *Mack,* this Court held that the provision of a city charter creating a private cause of action against the city for sexual orientation discrimination was preempted by state law on governmental immunity. In *Mack*, as in *Llewellyn*, this Court relied upon Article 7 of the Michigan Constitution and the Home Rule Act. Plaintiffs have not pointed to one case in which the Michigan courts have applied preemption analysis to a provision of a school district contract, or any other type of contract for that matter. Nor could they. Such an analysis would make little sense, as preemption is about the relationship between bodies of law, not the relationship between law and contract.

Plaintiffs attempt to bridge the obvious gap between a school district contract and preemption analysis by pointing to Michigan cases that stand for the proposition that the District is a "political subdivision created by the state." (*See* Application for Leave to Appeal at pp. 14-15.) Of course, Defendants do not contest that the District is a creature of the state; the School Code makes that point abundantly clear, as does Michigan case law. *See In re School Dist No 6*, 284 Mich 132; 278 NW 792 (1938) (education in Michigan is a matter of state concern and not a part of local self-government except insofar as Legislature delegates that power). But being an arm of the state and being a *municipality*, to which Article 7, § 22 and the Home Rule Act apply, are two different things—a point made, ironically, by one of the cases Plaintiffs themselves cite. *See Detroit Bd of Educ v Michigan Bell Tel Co,* 395 Mich 1, 4-5; 232 NW2d 633 (1975) (holding that a school district, while a "type of municipal corporation," is not a "municipality" or "governing body".) A school board does not and cannot *legislate* or *make law*, local or otherwise. *Rowley v Garvin*, 221 Mich App 699, 707; 562 NW2d 262 (1997) ("the Legislature may not delegate legislative power to each county school board"). Plaintiffs' preemption analysis is irrelevant.[9]

[9] Plaintiffs also direct the Court to a handful of cases in which contract provisions were invalidated because they conflicted with a state statute. In *Mino v Clio School Dist*, 255 Mich App 60; 661 NW2d 586 (2003), the Court of Appeals struck the confidentiality provision of a severance agreement between the school district and an employee, finding that the provision contravened PERA's prohibition against entering into contracts that have the effect of suppressing information. *See* MCL 380.1230b(6). But this provision from PERA underscores Defendants' point that where the Legislature desires to rein in a school district's power to contract, it can and will do so, but where the Legislature is silent, as on the matter of domestic partner benefits, the District is free to contract as it wishes. Plaintiffs also point to the uncontroversial directive in *Metropolitan Council No 23 v Center Line*, 414 Mich 642; 327 NW2d 822 (1982), that contract provisions involving illegal subjects of bargaining under PERA will not be enforced, even if the parties bargain over them and wish them to be enforced. Like *Mino*, this illustrates that provisions of school contracts can be struck only where they are directly contrary to explicit legislative mandates.

E. Other Courts Have Soundly Rejected Challenges To Domestic Partner Benefits Policies.

It is significant that numerous courts in other states have affirmed the lawfulness of extending benefits to domestic partners of municipal or school employees. *See, Devlin v Philadelphia*, 862 A2d 1234, 1245 (Pa, 2004) (affirming an ordinance requiring certain employers to provide benefits to same sex partners of employees to the same extent provided to other employees, holding that the ordinance gives same sex partners "only very limited rights that do not even begin to mirror the extensive fabric of rights and obligations that the Commonwealth has afforded to married couples"); *Lowe v Broward County*, 766 So2d 1199 (Fla Dist Ct App, 2000) (same); *Heinsma v Vancouver*, 29 P3d 709 (Wash, 2001) (affirming city domestic partner ordinance); *Pritchard v Madison Metro School Dist*, 625 NW2d 613 (Wis App, 2001)(affirming school district domestic partner policy); *Crawford v Chicago*, 304 Ill App 3d 818; 710 NE2d 91 (1999) (affirming city domestic partner ordinance); *Slattery v City of New York*, 179 Misc 2d 740, 686 NYS2d 683 (Sup Ct, 1999) (same); *Schaefer v Denver*, 973 P2d 717 (Colo App, 1998). While it is true that none of these cases is binding on this Court, they are instructive for their treatment of the differences between marriage and domestic partner benefits, and for the general proposition that courts have been hesitant to strike domestic partner benefit policies which are, like the policy in this case, self-contained and narrowly defined.

Finally, it is important to note that courts have upheld domestic partner ordinances far more wide-ranging in effect, and far more closely related to marriage, than the District's domestic partner benefit contract provision. For example, Montgomery County, Maryland enacted an "Employee Benefits Equity Act" with the rationale that "it is unfair to treat employees differently based solely on whether the employee's partner is legally recognized as a spouse." *Tyma v Montgomery County Counsel*, 801 A2d 148, 150 (Md, 2002). The Act

amended the county code definitions of "immediate family" and "relative" to include domestic partners, so that federal COBRA benefits and Family Medical Leave Act benefits would extend to domestic partners. Despite this broad effect, the Supreme Court of Maryland found:

> The Act at issue in this case does not, and does not purport to, define, redefine or regulate marriage in Maryland . . . Nothing in the Act purports to, or can be construed to, create an alternate form of marriage, authorize common law marriage or create any legal relationship. Nor does the Act, by its terms or implication, restrict, modify or alter any rights incident to marriage recognized in this State or give one domestic partner rights, beyond the employment benefits enumerated, against the other.

Id. at 158. Thus, the ordinance was upheld.

Similarly, a Denver ordinance provided health and dental benefits to the "*spousal equivalent*" of a city employee, a term the ordinance defined as "an adult of the same gender with whom the employee is in an exclusive committed relationship, who is not related to the employee and who shares basic living expenses with the intent for the relationship to last indefinitely." *Schaefer* 973 P2d at 719 (Colo App, 1998). Plaintiff taxpayers claimed that the city exceeded its authority by enacting this ordinance because marriage was a matter of statewide concern, and the state had preempted the subject by adopting statutes conflicting with the ordinance. But even here, where Denver called domestic partners "spousal equivalents," this argument was rejected. The Court held, "[t]he ordinance qualifies a separate and distinct group of people who are not eligible to contract a state-sanctioned marriage to receive health and dental insurance benefits from the City. Therefore, the ordinance does not adversely impact the integrity and importance of the institution of marriage." *Id.* at 721.

These cases affirmed domestic partner ordinances that arguably impinge upon the state's power to regulate marriage — the Montgomery County ordinance by enabling domestic partners to receive federal benefits, and the Denver ordinance by labeling domestic partners as "spousal equivalents." Here, in contrast, the challenged policy has nothing to do with marriage. If these

ordinances are permissible, surely a contract provision extending benefits to domestic partners of District employees — and nothing more — is also permissible.

For all of the above reasons, should this Court reach the issue, Plaintiffs' claim that the benefits policy violates DOMA fails.

IV. THE APPLICATION OF THE NEW CONSTITUTIONAL AMENDMENT TO PROHIBIT SAME SEX DOMESTIC PARTNER BENEFITS VIOLATES NUMEROUS PROVISIONS OF THE MICHIGAN AND U.S. CONSTITUTIONS, AND THE UNDERSTANDING OF THE VOTERS WAS THAT THE AMENDMENT WOULD NOT PROHIBIT SUCH BENEFITS.

Finally, should this Court decide to reach the issue of the applicability of the new Constitutional Amendment to the benefits policy at issue (despite the fact that this issue has never been briefed in this matter, is not a part of the claim as set forth in Plaintiffs' Amended Complaint, no record has been developed on the issue, the Court of Appeals did not permit briefing on the issue, neither court below addressed the issue, and the issue is currently pending in Ingham Circuit Court in another matter), Defendants will brief the following issues in greater detail, but believe this Court will determine that: 1) the amendment does not prohibit the provision of same sex domestic partner benefits, and 2) such an interpretation of the amendment is unconstitutional.

A. The Amendment Was Never Intended To Prohibit The Provision Of, Or To Take Benefits Away From, The Same Sex Partners and Children Of Government Employees.

The first principal of constitutional interpretation is that a constitutional provision be interpreted in "the sense most obvious to the common understanding"—the one that "the great mass of people themselves, would give it"—and with reference to the "circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished." *Soap & Detergent Ass'n v Natural Resources Comm,* 415 Mich 728, 745; 330 NW2d 346 (1982). This rule has particular significance when a constitutional amendment is

being considered. *WPW Acquisition Co v City of Troy*, 250 Mich App 287, 311, 646 NW2d 487 (2002) ("[t]he language of a constitutional amendment should be read in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then construed, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted.").

As Defendants illustrated in their Motion for Reconsideration filed in the Court of Appeals (attached hereto as Exhibit C), the "common understanding" of the amendment among Michigan voters was that the amendment would not prohibit domestic partner benefits. As stated above, the "circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished," *Soap & Detergent Ass'n*, 415 Mich at 745, are the most important facts when interpreting a constitutional amendment. In the case of the passage of Proposal 2 (the ballot initiative that created the amendment at issue), there is overwhelming evidence that the voters did not believe they were voting for an amendment that would prohibit benefits. That evidence includes:

Proponents of Proposal 2 explicitly stated to the press that the amendment would not affect domestic partner benefits. (*See, e.g.,* "Proposal 2: Preserving the Traditional Family or Threatening the New," *mlive.com*, Lansing Bureau, Oct 24, 2004, Exhibit B to Exhibit C hereto(in which Gary Glenn, President of the American Family Association of Michigan, stated that talk that the proposed amendment would threaten domestic partner benefits was a "scare tactic" and insisted that public and private employers could continue to offer domestic partner benefits; "Gay Rights Issue Creates Little Stir," *The Detroit News*, Oct 27, 2004, attached as Exhibit C to Exhibit C hereto, in which Kristina Hemphill of Citizens for the Protection of

Marriage stated that the proposed amendment was about defining marriage, and as for people losing benefits, "nothing on the books" would change).

Brochures distributed by Citizens for the Protection of Marriage, Proposal 2's ballot committee, stated that the amendment would not affect benefits. (*See, e.g.*, Exhibit D to Exhibit C hereto, which states that Proposal 2 is "*only* about marriage" and "not about rights or benefits" (emphasis in original)).

Proponents of Proposal 2 repeatedly testified before the State Board of Canvassers that the amendment would not affect contractually provided for domestic partner benefits, and in fact, that was one "myth" being circulated about the amendment. (Exhibit E to Exhibit C hereto, August 23, 2004 Testimony before Board of State Canvassers, at pp. 26-19). This testimony was offered in response to questions among the State Board of Canvassers about the specific meaning of the final words of the amendment, "for any purpose." *Id.* at p. 23.

All of this evidence illustrates that "the sense most obvious to the common understanding," the one that "the great mass of people themselves" would give the constitutional amendment, *Soap & Detergent Ass'n,* 415 Mich at 745, is that it would not prohibit benefits such as those granted by the AAPS. Yet Plaintiffs now have the temerity to argue that, despite all of the above representations, and despite the fact that the amendment makes no reference one way or another to the provision of benefits, "there is no question that" the District's benefits policy is contrary to the "plain meaning" of the amendment. (Application for Leave to Appeal at p. 13.) Because the evidence establishes that the voters did not intend for the amendment to deprive persons of benefits such as health care coverage, this Court should rule that, just as the proponents of the amendment have repeatedly claimed, the amendment is about marriage and marriage only, and is inapplicable to the provision of benefits.

B. The Interpretation Of The Amendment To Prevent Same Sex Domestic Partner Benefits Conflicts With Other Constitutional Provisions.

As the Court knows, any construction of a constitutional provision that creates constitutional invalidity must be avoided. *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971). On such principle, the amendment cannot be interpreted to prohibit Defendants' domestic partner benefits policy.

First, such an interpretation would violate the contracts clause of the Michigan Constitution, as well as the federal Constitution. The Constitution states "no bill of attainder, *ex post facto* law, or law impairing the obligation of contract shall be enacted". Const 1963, art 1, § 10. *See also,* US Const, art I, § 10. This clause prohibits any law that will impair the obligations set forth in a contract, including, as here, collective bargaining agreements negotiated between unions and employers. *See, e.g., Washtenaw Comm College Educ Ass'n v Washtenaw Comm College Bd of Trustees*, 50 Mich App 467, 471; 213 NW2d 567 (1973). Another way to put it is that vested rights acquired under a contract may not be destroyed by subsequent state legislation. *Seitz v Probate Judges Retirement System*, 189 Mich App 445, 455; 474 NW2d 125 (1991). Stripping the AAPS employees of benefits for their domestic partners on the grounds that the benefits are now prohibited by the 25th amendment would be a clear violation of the contracts clause as well as a retroactive, *ex post facto* application of the amendment, which is clearly unconstitutional.

Second, applying the amendment to prohibit the benefits at issue violates the equal protection clauses of the Michigan Constitution and the U.S. Constitution. The state Constitution states: "no person shall be denied the equal protection of the laws, nor shall any person be denied the enjoyment of his civil or political rights..." Const 1963, art 1, § 2; *see also* US Const, Am XIV. Of course, this is an argument that will need to be briefed in detail should this Court

decide that this is the time and case in which to decide this important issue. In sum, however, such an application targets a select group, namely, same sex couples, for loss of benefits. It also deprives governmental entities, such as school boards, universities, and municipalities, of the ability to determine that for whatever reasons they deem appropriate, including the recruitment and retention of employees, they will provide such benefits, tying their hands and putting them at a competitive disadvantage. And all of this is done for no reason other than the sexual orientation of the employees, a precedent which could set up a domino effect of what will appear to be state sanctioned discrimination.

Finally, both the Michigan and U.S. Constitutions prohibit bills of attainder, defined as a legislative acts that "apply...to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial". *Matulewicz v Governor of Michigan*, 174 Mich App 295, 305-06; 435 NW2d 785 (1989); Const 1963, Art 1, §10; US Const, Art 1, § 10. Construing the amendment to prohibit the provision of same sex partner benefits will inflict punishment on an easily ascertainable group and would therefore be unconstitutional.

As shown above, should this Court reach the issue of the applicability of the new amendment to the District's same-sex benefits policy, a host of issues will be opened, not the least of which is the constitutionality of the interpretation of the amendment urged by Plaintiffs. However, Defendants believe that, should the Court reach the issue, it will find that the provision of same-sex partner benefits is not prohibited by the Constitutional amendment.

CONCLUSION

Plaintiffs-Appellants have failed to meet any of the grounds set forth in MCR 7.302(B)(1)-(3) that would enable this Court to grant leave to hear their appeal. If the Court does grant leave to appeal, it should consider only that issue addressed by the Court of Appeals, namely, whether Plaintiffs have standing to bring suit, and the Court of Appeals' decision should

be affirmed. This Court should not reach the substantive issue, never addressed by a court in this matter, of the legality of the same sex benefits provided by the District to its employees. If the Court does reach those issues, it should determine that the District's provision of same sex domestic partner benefits as part of a bargained for contract does not violate Michigan law.

RELIEF REQUESTED

Defendants-Appellees request that this Court enter an Order DENYING Plaintiffs-Appellants' Application for Leave to Appeal.

Respectfully submitted,

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Dated June 20, 2005

INDEX TO EXHIBITS

Exhibit A	Amended Complaint
Exhibit B	December 29, 2993 Opinion of Washtenaw County Circuit Court
Exhibit C	Motion for Reconsideration in Court of Appeals
Exhibit D	April 14, 2005 Court of Appeals' Opinion
Exhibit E	Exemplar letters from Plaintiffs

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